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In the Supreme Court of the United States

OCTOBER TERM, 1997

CASSANDRA JENKINS, a minor by her mother
SANDRA HALL, and
ONEIKA McKENZIE, a minor, by her mother
ELIZABETH McKENZIE, *Petitioners*,

v.

SUSANNAH HERRING and MELBA SIRMON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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13pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Reasons for Granting the Writ 1

Conclusion 10

TABLE OF AUTHORITIES

Anderson v. Creighton, 483 U.S. 635 (1987) 7

Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977) 5

Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984) 5

Courson v. McMillian, 939 F.2d 1479 (11th Cir. 1991) 3

Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980) (*per curiam*), *cert. denied*, 451 U.S. 1022 (1981) 5

Elder v. *Holloway*, 510 U.S. 510 (1994) 5, 6

State ex rel. Galford v. Mark Anthony B., 433 S.E.2d 41 (W. Va. 1993) 5

Hamilton v. Cannon, 80 F.3d 1525 (11th Cir. 1996) 3

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 3, 6

Lassiter v. Alabama A & M Univ., 28 F.3d 1146 (11th Cir. 1994) (en banc) 8

Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) 5, 6-7

Mitchell v. Forsyth, 472 U.S. 511 (1985) 8, 9

Monell v. Department of Social Services, 436 U.S. 658 (1978) 2

New Jersey v. T.L.O, 469 U.S. 325 (1985) ..... *passim*

Oliver v. McClung, 919 F. Supp. 1206 (N.D. Ind. 1995) ... 5

Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985) 5

United States v. Lanier, 117 S. Ct. 1219 (1997) .... *passim*

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REPLY BRIEF FOR PETITIONERS

Respondents' brief in opposition only confirms that this case warrants this Court's review. First, respondents acknowledge that there is a circuit conflict on the issue of which jurisidictions' precedents are to be considered in a qualified immunity case to determine whether the law was "clearly established." Second, respondents do not question our observations (Pet. 22-24) that every court that has upheld even a partial strip search in a school setting dealt with a search for weapons or other dangerous contraband, and that every court reviewing a strip search for items not posing any imminent risk of serious harm, such as money, has held the search to be

unconstitutional. Instead, respondents suggest that we have waived reliance on any cases other than *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), that support our contention that petitioners' rights were clearly established. There is no factual or legal basis for that suggestion.

Third, respondents unsuccessfully attempt to reconcile the decision below with *United States v. Lanier*, 117 S. Ct. 1219 (1997), by misconstruing *Lanier*'s core holding. The court of appeals' insistence that only factually specific, similar precedents can clearly establish the law cannot be squared with *Lanier*'s recognition that even cases with "notable factual distinctions" from the case before the court can clearly establish the law. *Id.* at 1227. Fourth, the factual differences between *T.L.O.* and this case do not negate the conclusion that *T.L.O.* plainly prohibits teachers' precipitate and repeated strip searches of eight-year-old students in search of seven dollars that another student reported missing.[1] Under respondents' interpretation of *T.L.O.*, no school search, no matter how

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[1] Respondents seek to downplay the detrimental impact of the court of appeals' standard on the enforceability of constitutional rights by speculating that the contours of students' Fourth Amendment rights might become more clearly defined in cases in which school officials "fail to raise the defense of qualified immunity," Br. in Opp. 17 n.11, but enforceability of constitutional rights should not have to turn on defendants' defaults. Respondents also suggest that constitutional standards could develop in cases against school boards, but claims against governmental entities under 42 U.S.C. 1983 require a showing that the constitutional violation resulted from an official policy or custom. *See Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). Such cases thus cannot clarify *T.L.O.*'s application to the typical strip search case, in which no governmental policy or custom is involved.

extreme or intrusive, would warrant a finding of liability. They maintain that "*T.L.O.* is nothing more than an abstract, general proposition which provides absolutely no instruction to school officials as to the permissible scope of student searches." Br. in Opp. 21. Certiorari should be granted in this case to dispel that notion.

1. Respondents concede (Br. in Opp. 15) that there is "some conflict" among the circuits on the question of which courts' decisions are relevant to the determination whether the law is clearly established under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Their suggestion (Br. in Opp. 15-17) that the decision below does not squarely conflict with the decisions of the First, Third, Sixth, Seventh, Eighth, Ninth and Tenth Circuits, is based on a syllogism. Respondents point out that the Eleventh Circuit considers some "nonbinding" precedent, as do decisions of seven other circuits we identified as conflicting with the decision below. *Id.* The only nonbinding precedents the Eleventh Circuit considers, however, are the decisions of the highest court of the state in which the case arose.[2] The seven other circuits, in contrast, consider

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[2] The petition stated that the Eleventh Circuit looks only to "binding" precedent, *see* Pet. 11, 16, but that characterization is admittedly an inadvertent oversimplification. The court of appeals on occasion also looks to the (nonbinding) decisions of the highest court of the state in which the claim arose. *See* Pet. 14-15; *Hamilton v. Cannon*, 80 F.3d 1525, 1531-1532 n.7 (11th Cir. 1996); *Courson v. McMillian*, 939 F.2d 1479, 1498 n. 32 (11th Cir. 1991) (holding that "clearly established law in this circuit may include decisions of the highest state court in states that comprise this circuit as to those respective states, when the state supreme court has addressed a federal constitutional issue that has not been addressed by the United States Supreme Court or the Eleventh Circuit").

nonbinding decisions from other jurisdictions, including other circuits, and, in some cases, decisions of district courts, and of state courts outside of the state where the case arose. *See* Pet. 16-18 (discussing cases). The decision below thus embraces a rule to which no other court adheres, and that is materially in conflict with decisions of at least seven other circuits.[3]

Respondents erroneously suggest that the application of a different standard would not have affected the result in this case because the precedents the court of appeals declined to consider "[do] not necessarily clearly establish the law." Br. in Opp. 16. As we contended in the petition, however, "the decided school search cases from other jurisdictions as of May 1992, taken together, certainly made petitioners' rights clear." Pet. 18; *see id.* at 26-27. If the cases from other jurisdictions had been considered, it would have been evident that respondents should not have been afforded qualified immunity.

2. Respondents assert (Br. in Opp. 5, 15 n.9, 18 n.12) that we have conceded that *T.L.O.* is the sole precedent that could have clearly established the law. That assertion does not detract from the certworthiness of this case. First, we made no such concession. Second, even if we had, it would not amount

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[3] Indeed, respondents' brief points out that the conflict is even more pervasive than we asserted in the petition. *See* Pet. 18 (describing the Second and Fifth Circuits as substantially in agreement with the Eleventh Circuit). As respondents note (Br. in Opp. 15), the Eleventh Circuit's standard is unique; while the Second and Fifth Circuits consider only this Court's and their own circuit precedents, the Eleventh Circuit also considers decisions of the highest court of the state where the case arose.

to a waiver and would have no effect on this Court's ability to consider all relevant cases in support our claim. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Elder* v. *Holloway*, 510 U.S. 510 (1994).

Petitioners repeatedly and consistently have relied on lower court cases, as well as on *T.L.O.*, to support the contention that petitioners' rights were clearly established. *See* Pet. 26-29 (citing cases). In the briefs to the court of appeals panel, petitioners cited other relevant cases in addition to *T.L.O. See, e.g.*, Pet'r C.A. Br. 20-21 & n.6 (citing *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980) (*per curiam*), *cert. denied*, 451 U.S. 1022 (1981); *Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984)). Before the *en banc* court, petitioners continued to assert the relevance of school search cases other than *T.L.O. See, e.g.*, Pet'r En Banc C.A. Br. 22 n.10, 27 n.13, 35 (citing *Doe v. Renfrow*, 631 F.2d 91; *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); *Oliver v. McClung*, 919 F. Supp. 1206 (N.D. Ind. 1995); *Bellnier v. Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977); *State ex rel. Galford v. Mark Anthony B.*, 433 S.E.2d 41 (W. Va. 1993). There is thus no basis for respondent's suggestion that we have somehow waived reliance on cases other than *T.L.O.*[4]

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[4] The court of appeals concluded that the parties "agree[d]" that *T.L.O.* was the only relevant school-search case and thus was "the sole precedent that could have clearly established the law for purposes of qualified immunity analysis." Pet. App. 6a n.1. Because the court states that conclusion without citation to the record, we do not know what comment the court might have been construing as manifesting our "agreement." In any event, the court's conclusion must be viewed in light of that court's rule limiting the universe of relevant cases. In stating that petitioners had identified no relevant case other than *T.L.O.*, the court of appeals was governed

Even if we had failed in the lower courts to identify relevant cases other than *T.L.O.*, no estoppel or waiver would have resulted. Rather, we could nonetheless raise, and this Court could rely on, any cases tending to show that petitioners' rights were clearly established. As this Court unanimously held in *Elder v. Holloway*, "appellate review of qualified immunity dispositions is to be conducted in light of all relevant precedents, not simply those cited to, or discovered by," the lower courts. 510 U.S. at 512.[5] Thus, any failure in the lower courts to identify cases that help to clearly establish the law does not affect our ability to identify such cases now. Indeed, even an affirmative disavowal of reliance on any cases other than *T.L.O.* would not have affected our ability to rely on additional cases in this Court. *See Lebron v. National R.R.*

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by its own rule that only cases from this Court, the Eleventh Circuit itself and the highest court in the state where the case arose can "clearly establish" a right within the meaning of *Harlow v. Fitzgerald*. See Pet. App. 14a n.3. It is precisely that rule limiting the universe of relevant cases that conflicts with holdings of other courts of appeals, and that petitioners challenge in this Court. Pet. i (Question 3); 14-18. The fact that the court of appeals viewed petitioners' contentions through the narrow lens of its own circuit rule cannot serve to insulate that rule from this Court's review.

[5] In *Elder*, the plaintiff's failure to call certain precedent to the district court's attention did not preclude him from relying on that precedent in the court of appeals. This Court reasoned that "[w]hether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.'" 510 U.S. at 516.

Passenger Corp., 115 S. Ct. at 965.[6] Under *Lebron*, petitioners' Fourth Amendment claim, and their contention that the law supporting it was clearly established, are plainly preserved and appropriate for review by this Court, without regard to whether some of the arguments petitioners now present might be new.[7]

3. Respondents' argument (Br. in Opp. 7-12) that the Eleventh Circuit standard is consistent with *United States v. Lanier*, 117 S. Ct. 1219 (1997), misses the mark. Respondents contend, in essence, that *Lanier* and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), stand for the same "principles," and that the decision below is "commensurate with *Anderson*," and thus with *Lanier*. Br. in Opp. 10. Respondents are wrong, however, because both the decision below and *Lanier* address an issue not resolved in *Anderson*, and do so in conflicting ways.

Anderson held that, "in light of preexisting law, the unlawfulness [of the challenged conduct] must be apparent,"

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[6] In *Lebron*, this Court reviewed an argument that the petitioners in that case had expressly disavowed in the court of appeals. *See* 115 S. Ct. at 964. The Court applied its "traditional rule" that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron*, 115 S. Ct. at 965 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)).

[7] In any event, if any such waiver had occurred, it would relate only to the third question presented, and would not warrant denial of certiorari on the other two questions. As we stated in our petition (Pet. 11, 20-27), *T.L.O.* on its own sufficed to clearly establish petitioners' Fourth Amendment rights.

but that "the very action in question" need not have "previously been held unlawful." *Id.* at 640. *Anderson* did not reach the question whether, in order to defeat qualified immunity, a plaintiff must show that factually similar conduct had been held unlawful. The Eleventh Circuit held that the plaintiff must, requiring that there be established law developed in "a concrete and factually defined context" that is "materially similar" to the challenged conduct. See Pet. App. 5a; *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc). This Court in *Lanier*, in contrast, held that the law can be clearly established even in the absence of "precedents that applied the right at issue to a factual situation that is 'fundamentally similar'" to the claim at issue, and even where there are "notable factual distinctions between the precedents relied on and the cases then before the Court." 117 S. Ct. at 1227. Because the conduct challenged in this case falls at or near the prohibited end of the constitutional spectrum established by *T.L.O.*, its unlawfulness is "apparent" under *Lanier* even in the absence of any prior, factually similar case. The Eleventh Circuit's requirement of factually similar precedent, and its conclusion that *T.L.O.* is too dissimilar and its standard too general to have clearly established the law in this case, conflict with *Lanier*.

Respondents seek to reconcile the court of appeals' requirement of factually specific precedent with *Lanier*'s contrary holding by pointing to this Court's caveat in *Lanier* that, "when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary." 117 S. Ct. at 1227. *See* Br. in Opp. 10-11 n.7 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530-535 (1985)). *T.L.O.* did not, however, "expressly leave open" the question whether strip searches by school personnel seeking small

amounts of money based on slim suspicion are constitutional. An issue is not "expressly" left open unless the Court states that it is declining to reach the issue.[8] If an issue were considered "expressly" left open under *Lanier*'s caveat simply because the Court had not explicitly addressed it, the caveat would swallow *Lanier*'s general rule that factually dissimilar precedent can clearly establish a constitutional right.

4. *Lanier* refutes respondents' argument (Br. in Opp. 19-22) that the generality of the *T.L.O.* standard, and the factual dissimilarities between *T.L.O.* and this case, "preclude[] a finding of clearly established law." *Id.* at *22*. The fact that the *T.L.O.* standard is flexible and thus "creates uncertainty in the extent of its resolve to prohibit" intrusions of students' privacy, 469 U.S. at 381 (Stevens, J., dissenting), does not mean that the application of the standard is uncertain in *every* case, as respondents suggest. Br. in Opp. 20. To be sure, there may be a relatively broad category of cases toward the middle of the constitutional spectrum to which the application of *T.L.O.* remains unclear. As we have argued (see Pet. 20-27), however, this is not such a case.

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[8] As an example, *Lanier* cites *Mitchell,* which was a constitutional challenge to a warrantless domestic national security wiretap. The cited passage in *Mitchell* points out that in *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967), "the Court was careful to note that '[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.'" 472 U.S. at 532. That express statement in *Katz* contributed to the *Mitchell* Court's conclusion that former Attorney General Mitchell was entitled to qualified immunity. *See id.* at 535.

5. Finally, respondents' assertions about the factual record provide no grounds for denial of review. Referring to the Board of Education's and Office of Civil Rights' determinations, and to "inconsistencies" in the girls' testimony, respondents suggest that the strip searches never took place. Br. in Opp. 3.[9] The record plainly is adequate, however, to support the unanimous conclusion of the district court, the court of appeals panel and the *en banc* court that a reasonable jury could have found the facts in petitioners' favor. *See* Pet. App. 2a-4a, 40a-43a, 45a.[10]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[9] OCR's own report acknowledged that there was "conflicting testimony whether the students were actually strip searched," and that OCR was unable to reach for interview "several" potential witnesses. *See* Pet'r C.A. App. 138-140.

[10] The *en banc* court recognized that, despite some discrepancies, petitioners' testimony was consistent "with respect to the assertion that they were asked to remove their clothing while inside the restroom." Pet. App. 3a. With regard to the putative basis for conducting the strip searches, respondents contend that "McKenzie had repeatedly asked and been given permission to go to the restroom after the regular restroom break." Br. in Opp. 2. Petitioners, however, dispute whether Herring or Sirmon knew of those requests when they made the girls strip, *see* Pet. App. 30a-31a & n.11, and McKenzie's restroom trips could not in any event provide any support for strip searching Jenkins.

Respectfully submitted.

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